

SET 3 1987

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KEITH W. HOLE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 86-231

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal from Department of Ecology Order No. DE 86-C241, imposing a \$100 fine for alleged unauthorized withdrawals from a well adjacent to the Methow River, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman (presiding), Judith A. Bendor and Wick Dufford, Members, at a formal hearing in Yakima, Washington, on May 7, 1987.

Appellant represented himself. Respondent Department of Ecology appeared by Peter R. Anderson, Assistant Attorney General. Court reporter Malinda Avery of Jackie Adkins and Associates recorded the proceedings.

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to the persons and addresses listed thereon,
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on June 1, 1987

1 Witnesses were sworn and testified. Exhibits were examined. From
2 testimony heard and exhibits examined, the Board makes these:

3 FINDINGS OF FACT

4 I

5 Respondent Washington Department of Ecology (DOE) is a state
6 agency charged with the allocation and regulation of surface and
7 groundwater usage within the state.

8 II

9 Appellant owns a piece of orchard property along the Methow River
10 in Section 27, Township 31N, Range 22E, in Okanogan County. There is
11 a well located on this piece of property. There is hydraulic
12 continuity between the well and the river. The instant controversy
13 involves this well.

14 III

15 Mr. Hole is the holder of a groundwater certificate No.
16 G4-25337C. This certificate gives Mr. Hole the right to withdraw 140
17 gallons per minute, 60 acre feet per year, from his well from May 1 to
18 September 30, for the irrigation of 14 acres. By explicit terms of
19 the certificate, the withdrawal of water from the well is
20 interruptible when the flow of the Methow River falls below enumerated
21 flows at the Pateros gaging station.

22 IV

23 Appellant does not reside on the subject property. During the
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1 summer of 1986, the orchard on the property was being irrigated for
2 Mr. Hole by Mr. Dale Zahn.

3 V

4 Commencing on May 16, 1986, DOE sent a series of letters to Mr.
5 Hole describing water flows in the Methow River with predictions of
6 future water flows and the likelihood of interruptible rights being
7 affected. Letters were sent to Mr. Hole on May 16, May 29, June 13,
8 July 1, July 16, August 1, and August 18, 1986. During the summer
9 letters were also sent to Dale Zahn on July 1, July 16, August 1, and
10 August 18, 1986, that were identical to those letters sent to Mr. Hole
11 on the same dates. In addition, a "preliminary posting" was made at
12 the well itself in late June 1986 warning of the possibility of
13 shut-off later in the season.

14 VI

15 On August 27, 1986, the flow of the Methow River at the Pateros
16 gaging station fell below the minimum instream flows specified in WAC
17 173-548. As a result, the DOE issued Order No. DE 86-C215 and mailed
18 it to Mr. Hole and Mr. Zahn.

19 Order No. DE-C215 in pertinent part reads as follows:

20 On August 27, 1986 the flow of the Methow River fell
21 below the minimum instream flows adopted by Chapter
22 173-548 of the Washington Administrative Code. In
23 accordance with the provisions of Ground Water Certificate
24 No. G4-25337C, you are hereby ordered to cease and desist
25 from diverting or withdrawing public waters under the
26 above referenced right, effective August 29, 1986. This
27 order will remain in effect through the remainder of the

1 1986 irrigation season; however, daily modifications to
2 this order, if appropriate, are available on a toll-free
message line. The Toll-Free Number is 1-800-843-6846.

3 You may resume diverting or withdrawing water under
4 Ground Water Certificate No. G4-25337C only when advised
5 that the actual river flows for your reach of the Methow
6 River are above the adopted minimum flows. If the river
7 flows do increase to a point allowing diversion of water
8 later this year, it is your responsibility to call the
9 toll free message line each day to determine that your
reach of the river and downstream reaches are above the
minimum flows. Your permit is subject to minimum flows
established for the Lower Methow reach, and all reaches
further downstream. If you have any questions about the
daily messages, contact the Department of Ecology at (509)
575-2800 for clarification.

10 VII

11 On September 6, 1986, an employee of DOE observed groundwater from
12 the well covered by Certificate G4-25337C being used to irrigate Keith
13 Hole's land. On that day the flows in the lower Methow remained below
14 the adopted minimum. Notice of this low-flow situation was recorded
15 and available on the toll free message line, both on that day and the
16 previous day.

17 VIII

18 On September 30, 1986, the DOE issued Notice of Penalty Incurred
19 and Due No. DE 86-C241 assessing a civil penalty of \$100 for diverting
20 water during the time the Methow River was below the minimum flows.

21 IX

22 On October 14, 1986, Mr. Hole filed an application for relief from
23 \$100 penalty imposed. On November 18, 1986, DOE affirmed the \$100
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1 penalty. Feeling aggrieved by this decision appellant appealed the
2 fine to this Board December 23, 1986.

3 X

4 Mr. Hole admitted that water was indeed being pumped from the well
5 on September 6, 1986. Moreover, he acknowledged that he had received
6 the cease and desist order prior to September 6. He could have caused
7 the pumping to cease. The pumping, however, was deliberately
8 continued after the cease and desist order was known to him.

9 XI

10 Mr. Hole's explanation was that he authorized the continued
11 pumping because he thought DOE would shortly approve of it. His
12 reasons for thinking this require a brief explanation.

13 In the summer of 1985, a year earlier, DOE engaged in its first
14 effort to enforce the irrigation cut-off requirements on certificates
15 subject to minimum flows on the Methow and other rivers in Central
16 Washington. During that first season of experience, the agency
17 accepted uncritically, the assertions of irrigators claiming vested
18 water rights for lands covered by so-called interruptible certificates
19 -- so long as such assertions were made at the time of regulation.
20 Williams v. DOE, PCHB No. 86-63 (1986) describes the regulatory
21 routine then practiced.

22 When interruption of Hole's irrigation from the well was attempted
23 in 1985, DOE's inspector was informed of a claim to vested right to
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1 irrigate the orchard from the river. On verifying that this claim was
2 on file, the agency approved a temporary change of point of diversion,
3 allowing withdrawals from the well to continue under authority of the
4 asserted river diversion right.

5 Mr. Hole assumed that this same process would be followed in
6 1986.

7 XII

8 DOE, in fact, undertook a more rigorous approach to regulation in
9 1986. The agency determined to adopt a substantial early warning
10 effort about the likelihood of regulation. At the same time, DOE
11 decided to attempt to deal with requests for change of point of
12 diversion in advance of the crisis atmosphere of late summer, but not
13 to process 1986 requests at the eleventh hour.

14 This was explained at a community meeting for Methow irrigators
15 held in Twisp in early July. Mr. Hole was notified of this gathering
16 but did not attend; nor apparently did Mr. Zahn. Neither inquired of
17 DOE as to what went on there.

18 XIII

19 Separately, the following scenario was followed by Mr. Hole:

20 On February 1986, he asked DOE about how he could make the change
21 of point of diversion permanent. He was advised that he needed to
22 make a formal application, and application forms were sent to him on
23 February 28. DOE heard nothing more from Mr. Hole about this matter
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1 until July. On July 7, 1986, the agency sent a letter to him asking
2 why the application had not been filed and warning that without
3 receipt of the application, as well as a written request for a
4 temporary change, the agency would not be able to allow well pumping
5 when the river was below minimum. On July 20, Hole acknowledged
6 receipt of July 7 letter, and said he was in the process of assembling
7 the necessary documents. He asked for a temporary change. On August
8 6, DOE responded that no temporary change could be granted until an
9 application for permanent change was filed. The letter requested
10 documents substantiating the claim to a vested right to accompany the
11 application.

12 The completed application was finally received by DOE on September
13 2, 1986, six days after the flows fell below minimum and regulation of
14 the Methow was initiated. DOE had not acted on this application at
15 the time of the hearing.

16 XIV

17 Any Conclusion of Law which is deemed a Finding of Fact is hereby
18 adopted as such.

19 From these Findings of Fact, the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 The groundwater code, Chapter 90.44 RCW, was enacted in 1945. Its
23 purpose is stated in RCW 90.44.020:

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(7)

1 This chapter regulating and controlling groundwaters of
2 the state of Washington shall be supplemental to chapter
3 90.03 RCW, which regulates the surface waters of the
4 state, and is enacted for the purpose of extending the
application of such surface water statutes to the
appropriation and beneficial use of ground waters within
the state.

5 II

6 Minimum flow restrictions imposed pursuant to chapters 90.22 RCW
7 and 90.54 RCW apply to all appropriations approved subsequent to the
8 establishment of the restrictions which can effect the flow regime.
9 RCW 90.03.247, RCW 90.03.345. Groundwater withdrawals are, thus,
10 subject to such restrictions when the withdrawals involve waters in
11 hydraulic continuity with affected surface water sources.

12 III

13 Mr. Hole's groundwater certificate G4-25337C when issued, was
14 expressly made subject to existing minimum flow restrictions for the
15 Methow River. DOE's cease and desist order implemented the
16 restrictions. The withdrawals from Hole's well on September 6, 1987,
17 were a violation of the terms of his certificate, as well as of the
18 cease and desist order. As such, the withdrawals were violations of
19 the underlying statute, RCW 90.44.050 and 080.

20 IV

21 Civil penalties are authorized by RCW 43.83.335, which reads:

22 The power is granted to the department of ecology to levy civil
23 penalties of up to one hundred dollars per day for violation of
24 any of the provisions of this chapter and chapters 90.03, 90.22,
and 90.44 RCW, and rules, permits, and similar documents and

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1 regulatory orders of the department of ecology adopted or issued
2 pursuant to such chapters. The procedures of RCW 90.48.144 shall
3 be applicable to all phases of the levying of a penalty as well as
4 review and appeal of the same.

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V

We conclude that the penalty here was properly issued for incident in question. Under existing precedent, it was unlawful for Mr. Hole to take matters into his own hands and continue to irrigate from the well after being ordered by DOE not to do so. Such self-help, in disregard of a duly issued order, was long ago recognized as an independent violation of the water code. State v. Lawrence, 165 Wash. 508, 6 P.2d 363, (1931). The recourse of the water user is through the appeals process provided by law.

VI

We are unconvinced by Mr. Hole's explanation that any relief from the penalty for this admitted violation should be given. He should have obeyed the agency's order until advised otherwise. It is as simple as that.

We do not think DOE misled him. On the basis of the numerous communications from DOE to him during 1986, he should have been on notice of a changed regulatory approach, the details of which he could have obtained on the slightest inquiry.

VII

Should Mr. Hole ultimately secure approval for a change of point of diversion of his vested right claim, he would be able to use his

1 well free of the minimum flow restrictions. This is because the claim
2 relates to a use initiated long before the minimum flows were
3 established. RCW 90.03.010, RCW 90.03.345.

4 The validity of such a claim cannot be finally determined except
5 by a judicial adjudication. But, before approving a change of point
6 of diversion, DOE must investigate the claim sufficiently to reach a
7 tentative determination on its probable validity. See Funk v.
8 Bartholet, 157 Wash 584, 289 Pac. 1018 (1930). Investigations of this
9 type involve a painstaking and thoughtful analysis of
10 often-conflicting historical documents. To conduct such an
11 investigation takes time.

12 We endorse the agency's view that even-handed administration of
13 the water resource allocation system requires that these
14 investigations be carried out with care and thoroughness. Persons
15 whose diversions otherwise ought to be regulated should not escape
16 regulation on the basis of unsubstantiated and, perhaps, invalid
17 claims to the detriment of those making no such claims. In so saying,
18 we, of course, intimate no opinion on the merits of Mr. Hole's claim.

19 VIII

20 Any Finding of Fact which is deemed a Conclusion of Law is hereby
21 adopted as such.

22 From these Conclusions of Law the Board enters this
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ORDER

The Civil Penalty (DE 86-C241) is affirmed.

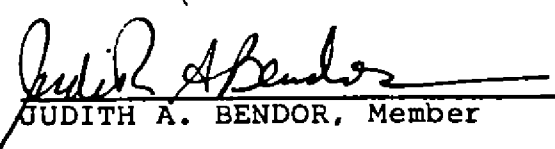
DATED this 6th day of July, 1987.

POLLUTION CONTROL HEARINGS BOARD

 7/6/87

LAWRENCE J. FAULK, Chairman

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WICK DUFFORD, Member

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JUDITH A. BENDOR, Member

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